

COMPLIANCE BOARD OPINION No. 97-15

September 23, 1997

Mr. Kye Parsons

The Open Meetings Compliance Board has considered your complaint of June 13, 1997, concerning what you allege to be an illegally closed joint meeting of the Salisbury City Council and the Wicomico County Council on June 4, 1997. For the reasons explained below, the Compliance Board is unable to reach a definitive conclusion about the legality of this closed meeting.

I

Complaint and Responses

According to the notice posted on May 30 by the Salisbury City Council, the June 4 meeting was to be closed to “discuss personnel issues” After the meeting, the County Council issued a press release stating that the two councils discussed “matters with personnel implications.” According to the press release, “Members of the two governing bodies made observation of the many areas of cooperation between the [two] governments There followed discussion of areas where the two governments could do more work together” In particular, the press release went on, the two governing bodies discussed “joint purchasing between the two governments” The councils also agreed to study the possibility of cooperating in human resources and personnel management matters. Finally, the two councils announced that they would be holding regular joint meetings on the first Wednesday of every month.

The core of your complaint is that this meeting should have been open, at least in part. You also assert that neither public body provided minutes of the meeting and that the County Council provided no notice.

In a timely response on behalf of the Salisbury City Council, City Attorney Robert A. Eaton stated that the closing of the meeting was proper pursuant to the personnel exception of the Open Meetings Act, §10-508(a)(1) of the State Government Article, in order to protect the privacy of the individual employees involved. The meeting was closed, Mr. Eaton explained, to discuss the possibility of establishing a joint purchasing office. “Naturally, in looking

at combining offices, be it Purchasing Offices or others, one must consider a reduction in work force and this clearly affects individual employees.” Mr. Eaton acknowledged that the press release had also referred more broadly to areas of potential cooperation concerning “human resources” and “personnel management.” These areas too, Mr. Eaton contended, “are reasonably related to the appointment, employment, assignment, promotion of employees or to other personnel matters”

Responding on behalf of the Wicomico County Council, County Attorney Edgar A. Baker, Jr., stated the Council’s view that the Act did not apply in this situation. Pointing to the provision of the Wicomico County Charter that grants the County Council “executive power” and ultimate authority over “the administration of the functions of the several departments” and “centralized purchasing provisions,” Mr. Baker contended that the June 4 meeting fell within the Act’s “executive function” exclusion: “Clearly, the County Council is charged with the executive function to explore the most efficient means available of administering the day to day activities of County government. This would include meeting with another agency which performs similar functions to explore possible avenues to create greater efficiency in the delivery of those services. Mr. Baker also suggested that the City Council’s reliance on the Act’s “personnel” exception was justified: “The supervision and coordination of administrative functions often impacts individual employees. The consideration of consolidation of functions to achieve greater efficiency of necessity involves potential reduction in personnel.”

II

Applicability of the Act

The Open Meetings Act applies if three things are true: a “public body” is involved, the public body is holding a “meeting,” and the substance of the meeting is subject to the Act. There is no dispute that the gathering on June 4 involved two public bodies, both of which were holding a meeting. Therefore, the Act applied unless the discussion at the meeting was outside the scope of the Act.

In considering this issue, the Compliance Board must acknowledge a problem at once obvious and intractable: The Board has no way of knowing what went on behind closed doors. Unlike a judicial proceeding, in which the court can weigh an evidentiary record derived from discovery techniques and testimony under oath, the Board’s complaint process must rely on a public body’s own account of discussions at a closed meeting.

Sometimes a thin factual record means that the Board cannot reach a firm conclusion. This possibility is accounted for in §10-502.5(f)(2) of the Act: “An opinion of the Board may state that the Board is unable to resolve the complaint.” When we have insufficient solid information about a closed-door discussion, the most that we can do is describe the plausible alternatives and their legal implications.

So it is in this case. Depending on what the two councils discussed at the June 4 meeting, the two may have been engaged in a “legislative function,” to which the Act applies and which is generally required to be carried out in open session. Yet, the two may have engaged in an “executive function,” which is beyond the scope of the Act and need not be carried out in open session.

“Legislative function” means “the process or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy.” §10-502(f). The Act requires that a “legislative function” be performed in open session, unless it may be closed pursuant to an exception under §10-508(a).

If the June 4 meeting included a discussion dealing with possible *new law* — that is, the amendment or repeal of Salisbury Code §16-1, which establishes the City Purchasing Department, or Wicomico County Code §801-1, which establishes the County Purchasing Department — then this discussion was a “legislative function.” The Act applies to a discussion whether a change in either law would be necessary in order to reflect consolidation or a takeover of the purchasing by one of the governmental bodies. If the topic were a potential change in these laws, all aspects of that legislation-oriented discussion would be subject to the Act, including information-gathering at the earliest stages of policy formation. *See* Compliance Opinion No. 97-2 (March 3, 1997).

If the two councils, however, only discussed the feasibility of consolidation as a matter of how best to administer *current law*, they were engaged in an “executive function.” With certain exceptions not pertinent here, neither the public notice nor any other provision of the Act applies to a public body when it is carrying out an “executive function.” “Executive function” is defined in part as “the administration of ... a law of a political subdivision.” §10-502(d)(1)(ii).

The Wicomico County Code vests in the County Council, as executive authority of the County, the power to supervise and coordinate the Administrative Director of Centralized Purchasing in “administer[ing] the centralized purchasing provisions.” Wicomico County Code §§406-1 and

§801-1(a). If the County Council only discussed the pros and cons of consolidation, that discussion involved the administration of existing County law about the administration of purchasing. In other words, the discussion would fall within the “executive function” exclusion if it were limited to an assessment of a different way of implementing a law already in force and effect. *See Scull v. Montgomery Citizens League*, 249 Md. 271, 282, 231 A.2d 92 (1968).

Likewise, the City Council carried out an “executive function” if its role in the meeting was limited to considering a different way of administering the centralized purchasing provisions. Salisbury City Code §16-1 provides that the Central Purchasing Department is headed by the Purchasing Agent, who is appointed by the Mayor with the advice and consent of the Council. The Purchasing Agent, “[u]nder the supervision of the Mayor and Council, makes all city purchases and sales” Like the County Council, the City Council was engaged in an “executive function” if it discussed the feasibility of consolidating the City purchasing department with the County purchasing department under existing law.

The responses from the two councils do not indicate whether they discussed, even in a preliminary way, the need for changes in their laws, or if the discussion was strictly limited to the possibility of combining the work of the respective purchasing departments under existing law. Nor can the Board assess, from the press release’s cryptic reference to “human resources and personnel management,” whether discussion of these topics would properly be seen as a preliminary stage of changes in County or City law. Based on the information available to it, the Compliance Board is unable to form an opinion whether the Act applied to this discussion.

III

Application of “Personnel” Exception

Even if the discussion was a “legislative function” and therefore subject to the Act, the meeting might nevertheless properly have been closed if, as the City Council contended, the Act’s “specific personnel matters” exception, §10-508(a)(1), applied:

A public body may hold a closed meeting to discuss:

- (i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials

over whom it has jurisdiction; or

(ii) any other personnel matter that affects 1 or more specific individuals.

This exception, like all others, is to be “strictly construed in favor of open meetings of public bodies.” §10-508(c). Hence, public bodies that invoke the exception must be careful to avoid discussion of general personnel issues beyond a decision-making process about identifiable individuals. Compliance Board Opinion No. 94-5 (July 29, 1994).

In its response, the City stated that in discussing whether to merge the respective purchasing departments, both councils had to consider the effect such a move would have on the three employees and the two department heads. Indeed, the Compliance Board can readily agree that a discussion about consolidating the purchasing functions would logically involve the status of the various employees’ continued employment, *e.g.*, possible dismissal, lay-offs, reassignment, or the like. These are the kinds of personnel matters covered by §10-508(a)(1). To the extent that the discussion of merging the purchasing offices was linked to decisions about identifiable individuals, it was within the confines of the personnel exception.

It is difficult for the Compliance Board to imagine, however, that the *entire* discussion was so confined. When the discussion turned, as surely it must have, to topics like economies of scale, integrating different control systems, and differing procurement priorities – in other words, the basic pros and cons of the idea – then the “specific personnel matter” exception did not apply. If that portion of the discussion was subject to the Act in the first place (see Part II above), it should have been open.

IV

Notice and Minutes

The Act’s requirements for notice, open session voting to close a meeting, the keeping of minutes, and limited disclosure about a closed meeting all apply if the Act itself does. Conversely, if the Act does not apply to a particular meeting, none of these requirements applies to that meeting. Therefore, if the June 4 meeting involved a legislative function, as discussed in Part II above, both councils were responsible for compliance; if the meeting involved an executive function, neither was obliged to comply.

Assuming for purposes of discussion that the Act did apply, we find as follows:

1. As to the notice required by §10-505, the City Council complied, but the County Council did not. The City's notice did not absolve the County Council of its duty to use its customary means of notice about the meeting.

2. As to the voting procedures required by §10-508(d), the City Council generally complied, but the County Council did not. The City Council did fail to list the topic of discussion, which is not synonymous with the authority to close the meeting. Uninformative boilerplate does not satisfy the Act. *See* Compliance Board Opinion No. 93-2 (January 7, 1993).

3. As to the subsequent disclosure required by §10-509(c)(2), the City Council generally complied, but the County Council did not. The City Council did fail to list the topic of discussion and actions taken. The Compliance Board notes, however, that the press release issued after the meeting contained these elements of disclosure.

4. The access to minutes required by §10-509(d) applies only to the extent that the discussion at the meeting exceeded the limits of the personnel exception. Minutes reflecting discussion within the confines of the exception are not available to the public. §10-509(c)(3)(iii).

V

Conclusion

The Compliance Board regrets its inability to offer a definitive response to your complaint, but it cannot present a conclusion that would be based largely on speculation. The Board cautions the City and County Councils, however, that future joint meetings, if they are to be closed to public observation, must be strictly limited either to the administrative matters referred to in the "executive function" exclusion or to the limited scope of the "personnel" or other exceptions.

OPEN MEETINGS COMPLIANCE BOARD

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